

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal No. 1269 of 2005

Kashinath Bajirao Vitekar
and others ..Appellants

vs.

Motilal Gulabchand Shah ..Respondents

Shri V.S.Gokhale for appellants.
Shri V.G.Mujumdar for respondents.

CORAM: S.C.DHARMADHIKARI J.
18th July, 2007

P.C.

1. Heard Shri Gokhale, appearing for the appellants/original plaintiffs.

2. The appellants filed the suit for redemption of mortgage on the basis, that as far as the suit property is concerned, their right is crystalised by virtue of the partition decree in Special Civil Suit No.124 of 1964. Therefore, they have a right to redeem the suit property in terms of the mortgage deed Exh.31.

3. The Trial Court accepted these contentions and decreed their suit but on appeal the lower Appellate Court reversed the same.

4. The only submission canvassed before me by Shri

Gokhale in support of the plea that a substantial question of law would arise for consideration is that the lower Appellate Court erred in law in holding that the law laid down by the Hon'ble Supreme Court in the case of Shankar Balwant Lokhande by LRs vs. Chandrakant Shankar Lokhande and another reported in 1995(3) SCC 413 is restricted to a claim for partition of immovable property and a share therein. The law laid down could not be extended by application of the principles therein to the suits which are filed for redemption of the mortgage. The instant suit being in the nature of redemption and the principal relief claimed therein being based on the mortgage deed at Exh.31, the relief could not be denied on the ground that the partition decree in the earlier Special Civil Suit has not been duly registered and, therefore, cannot be the basis of claim.

5. In any event, according to him, if the partition decree was insufficiently stamped, the principle that the stamp duty which is deficit can be paid even now, should be applied.

6. The lower Appellate Court has not committed any error in relying upon the decision of the Supreme Court (supra). The Supreme Court has laid down that a final decree in partition suit has to be stamped on stamp papers supplied by the parties. It has to be duly engrossed thereon for

it to become executable decree. The condition precedent is to draw the final decree and then to engross it on the stamp paper of requisite value. These two acts together constitute a final decree which crystalised the right of the parties in terms of the preliminary decree. Only such a decree is executable.

7. Admittedly, it is only the partition decree in the Special Civil Suit which was the basis of the plaintiffs' claim in the suit property and right to redeem the mortgage was also claimed on that basis. Once such a decree, which is not answering the requirements stipulated by law, is passed, then, the rights of the plaintiffs are not crystalised. In such circumstances, the relief on the basis of the mortgage deed for redemption could not have been granted. There is no substance in the contention of Shri Gokhale in as much as in the present facts and circumstances the relief was not independent but linked to the partition decree in the civil suit. That being not valid and executable the relief was rightly denied. The findings of fact which have been arrived upon considering the admitted position with regard to the partition deed require no interference in as much as no question of law much less substantial question of law would arise in the present second appeal. The second appeal is, therefore, dismissed.

(S.C.DHARMADHIKARI J.)